

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 497 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

KUMBHAR DALPAT GOVIND

Versus

STATE OF GUJ

Appearance:

MR MB AHUJA for Petitioner
MR YF MEHTA, APP for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 10/01/97

ORAL JUDGEMENT: (Per Pandya, J.)

1. The appellant has been convicted for offence punishable under Section 302, I.P.C. by the learned Additional Sessions Judge, Bhavnagar, who tried Sessions Case No.96 of 1986 and by his order dated 28.4.1988, after holding the accused guilty, awarded him life

imprisonment.

2. The case against the accused is to the effect that on 5.6.1986, between 3 and 3.15 P.M. in the locality called Vadva Talavadi of Bhavnagar city, at Khodiyar Chowk, near the temple, Budha Bachubhai was done to death by the accused and, for that purpose, he had used a knife, which later on in the deposition turns out to be a Kanjer (dagger), and thereby caused death of the said Budha Bachubhai.

3. It being a day light incident and that too in an open street, one would expect eye-witnesses and that exactly is the position. The complaint has been given by one Bharatbhai Nathabhai, P.W. 2, Ex.15. The complainant has not supported the prosecution and has given a go by to the version set out in the complaint itself. On hearing shouts, he came out of his house and went to the scene of offence and there he found dead body of Budha Bachubhai lying on the road. That is how his examination in chief reads.

4. The learned Public Prosecutor had, therefore, obtained permission of the Trial Court and had put all the contents of the F.I.R. to him and had obtained contradiction in that regard. He admits that he had given the complaint and further accepts that, though looking to the version given in examination in chief and the contents of the F.I.R. there is much contradiction between the two, yet he had not raised any objection before the Police Officer who had written down the complaint as to this additional material being incorporated in the F.I.R. As if this is not, the witness has further accepted that after recording of the complaint, his further statement was also recorded and at that time, the complaint was read over to him. It is very strange that in spite of this being read over, the witness does not open his mouth and raise an objection as if he were the eye-witness and though according to him, he was not the eye-witness to the incident.

5. The second eye-witness is Dhirubhai Mohanbhai Panwala, P.W.3, Ex.17. He has a Pan Shop near and, as expected, at the time of the incident, his shop situated just near to the place of incident was very much open and it is this witness who was carrying on the business. Having accepted his presence at the site, he simply says in his examination in chief that, he heard shouts and saw a crowd of people and found Budhabhai, the deceased, falling near his cabin (shop). About the main incident, he claimed ignorance and again he has been put questions

on behalf of the prosecution with the permission of the Court and he denies his previous statement before the Police.

6. The third eye-witness is Ratuben, P.W.4, Ex.18, page 50. She is the mother of the deceased. According to her, she was working in the kitchen of Nursing Training Institution of Sir Takhtasinhji Hospital, Bhavnagar. She was working as a labourer. Her timings were 8.30 in the morning to 2.30 in the afternoon. By the time she comes back to her home, it would be 3 o'clock because it takes about half an hour to reach from one place to the other.

7. On the day also, she came on the site by about 3 P.M. or so and, therefore, according to her, she was present at the time when the incident happened. This claim of Ratuben is seriously challenged before us and so done before the Trial Court. The learned Advocate Shri Ahuja has drawn our attention to the cross-examination of this witness, where at one stage she has accepted that she reached her place by about 3.30 P.M. Naturally, the learned Advocate, Shri Ahuja built up the entire defence on this and submitted that she could not have been an eye-witness at all. His further argument was that, looking to the scene of the incident and the map prepared for the purpose and produced before the Trial Court, Ex.6, page 15, her house is situated towards the north of that road referred to in the map as Ladivalo Road. The cross road coming from west towards east is referred to as Damar Road and a branch road towards south-east is referred to as road leading to Police Chowki. Right in the middle of that square is the spot, according to the prosecution to the north of which almost 3rd or 4th house is of the said witness. Slightly on the right only at a distance of 25 feet or so is the Pan Shop situated on the said road referred to as Damar Road abutting next to closed godown and a place occupied by M/s Perfect Wood Works.

8. Referring to the said admission of her arrival at 3.30 P.M., Shri Ahuja submitted that, if this be the position, the incident was very much over by that time and, therefore, she could not have been an eye-witness. In the cross-examination, she has admitted having come back to her house from the place of work, she was already inside the house and before that she had called her son to join her for meals and he replied that he is just coming. While she was inside after calling her son, she heard the shout and she came out. On this admission, Shri Ahuja submitted that if the incident had happened

near the said cabin of witness-Dhirubhai Panwala, obviously, from the house of the witness-Ratuben, nothing could have been seen as her line of vision would be obstructed by the said building described in the map as closed godown. We agree with him that had this been the position, certainly, the witness could not have seen the incident as claimed by her.

9. However, it may be recalled that one of the two reluctant witnesses, Dhirubhai, does say this much that the deceased came near to his shop and fell down. If that be so, obviously, the incident has not happened near the shop of witness Dhirubhai and the prosecution case all throughout has been that the incident happened almost in the middle of the said cross-road and the spot has been described in the map with a small square surrounded by a circle.

10. The possibility of pan shop being the spot where the incident occurred is sought to be made out on the basis of the medical evidence. As many as 13 injuries are said to have been inflicted on the deceased and especially when as a result of one of the injuries aorta has also been cut, it would not have been possible for the deceased to move at all and, according to Shri Ahuja, he would have fallen down at the place where he was given blows. As the body was seen near the pan shop, according to Shri Ahuja, the incident happened near the shop. The witness, who is hostile to the prosecution, namely, Dhirubhai, does not support this theory and only on the basis of there being as many as 13 injuries including the cutting of aorta, we are not prepared to draw an inference that the deceased was not even possible to stagger upto a distance of 25 feet.

11. In our opinion, therefore, it would be correct to hold that the incident happened at the spot indicated by the map, Ex.26. Once that is the position established, the possibility of Ratuben being in a position to see the incident is clearly made out.

12. The overall testimony of this lady, who is the mother of the deceased is clear to the effect that she left her place of work by about 2.30 P.M. and therefore, she reached home by about 3 P.M. or latest by 3.15 P.M. She has on the contrary claimed clearly in her cross-examination that she came back to her home at 3 P.M. In our opinion, therefore, we will not be able to accept the submission based on the fact that she, in the course of her cross-examination, has admitted that after her duty when she reached her home, it was 3.30 P.M.

13. Another submission made by Shri Ahuja is that, Ratuben's statement was recorded 24 hours after the incident. However, looking to the serious nature of the incident, that too in broad day light, when a man has been done to death and when F.I.R. and supporting witnesses are already there, the police authorities, in our opinion, would be rightly be concentrating on completing the rest of the formalities and then proceed further to record the testimony of other witnesses. Therefore, in our opinion, it will not come in the way of reducing the credibility of the testimony of this witness-Ratuben.

14. On the basis of the size of injury and its measurement set out in the postmortem note as well as Inquest Panchnama, a submission was made that, looking to the size of the dagger, these injuries could not have been caused by that weapon. As against that, the deposition of Dr. Joshi, Ex.13, is clear to the effect that the use of Muddamal Article No.3 shown to him, i.e. dagger, could have resulted into the injury that he had seen on the body. This part of the testimony is not at all challenged before the Trial Court. Under the circumstances, merely because this possibility is pointed out, at this stage, in our opinion, it will not be possible to accept that the dagger was not used at all and some other weapon, according to the suggestion, was used.

15. It was urged by the learned Advocate Shri Ahuja that the said witness has further, in cross-examination, stated that first the Ambulance has come at 2.30 P.M. and thereafter the corpse carrier has come at 3.30 P.M. However, the very next sentence as recorded in the cross-examination, of course attributed to the witness having stated voluntarily and the statement is to the effect that is unable to make out the exact timing. The learned Trial Judge also, therefore, had put specific question pointedly asking her whether she can understand the time around, thereby it would mean that she can understand passage of time. She says that, she is able to say the time. That means she can make out the time on looking to a clock or watch, but the passage of time and the particular time of the day when the incident might have happened, 2.30 P.M. or 3.00 P.M. or 3.30 P.M. and like, she is not very sure and, therefore, the aforesaid voluntary statement on her part that she cannot tell the time exactly. This is quite understandable because she is working as a labourer in the said training institute for nurses and except for manual labour and maintaining

her time for reaching the place, she is hardly required to maintain the time except for rising when the sun rises and close the day by its setting. Therefore, it is hardly necessary for her to mark the time from minute to minute and hour to hour as shortly elicited to her during her cross-examination. Her cross-examination in chief is very fair and her sequence is also quite distinct from each other and there is no uncertainty so far as that part is concerned. The presence of blood marks near Kodiyarmata Mandir, which is the spot shown in the map, in our opinion, is of no consequence and the prosecution story is that the body was found near the pan shop.

16. For the aforesaid reasons, the appeal is dismissed.

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